

January 3, 2006

**DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY**

Appeal

Name of Petitioner: Eric T. Kirk
Date of Filing: October 31, 2005
Case Number: TFA-0129

This Decision concerns an Appeal that was filed by Eric T. Kirk in response to a determination that was issued to him by the Director of the Department of Energy's (DOE) Environmental Management Consolidated Business Center (hereinafter referred to as "the Director"). In that determination, the Director replied to a request for documents that Mr. Kirk submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. The Director released certain documents to Mr. Kirk, but withheld portions of those documents. This Appeal, if granted, would require that we remand this matter to the Director for another search and for the release of the withheld material.

The FOIA generally requires that documents held by federal agencies be released to the public on request. However, Congress has provided nine exemptions to the FOIA that set forth the types of information that agencies are not required to release. 5 U.S.C. ' 552(b)(1) - (9); see also 10 C.F.R. ' 1004.10(b)(1) - (9).

I. Background

In his FOIA request, Mr. Kirk sought access to the following documents concerning "Mound Plant retiree medical benefits:"

1. The request from DOE to BWX Technologies (BWXT) requesting an evaluation of retiree medical benefits and any means to reduce the costs or like actions;
2. The acknowledgment from BWXT to DOE for the activity in 1 above including any proposed cost to conduct the evaluation;
3. The proposal(s) for any actions that could be taken from BWXT to DOE after an extensive quantity of research and evaluation was performed both by BWXT and legal firms employed by BWXT;

4. The acknowledgment by DOE of the information in 3 above and any direction on the decision made by the DOE.

In his response, the Director identified four documents as being responsive to Mr. Kirk's request. Document 1, a November 13, 2000 letter from Roland Reed of BWXT to "D. Franklin" of the DOE was provided to Mr. Kirk in its entirety. Documents 2 and 3, which are letters from "W.M. Farrell" of BWXT to Derrick J.C. Franklin of the DOE dated September 26, 2001 and March 29, 2002 respectively, were released to Mr. Kirk with portions withheld under Exemption 5 of the FOIA. 5 U.S.C. § 552(b)(5). Document 4, a memorandum dated March 28, 2002 and authored by the law firm of Vorys, Sater, Seymour and Pease, was also provided to Mr. Kirk in redacted form, with portions withheld under Exemption 5. In his Appeal, Mr. Kirk challenges the adequacy of the search that the Director performed and his application of Exemption 5.

II. Analysis

A. Adequacy of the Search

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord, Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

In support of his claim that the Director's search was inadequate, Mr. Kirk states that "at no time has [the Director's office] or any other DOE office provided the requested information . . . with regard to revision of EG&G retiree medical benefits . . . , although this was requested as a part of my FOIA request." Appeal at 1. However, the fact that the results of a search do not meet the requester's expectations does not necessarily mean that the search was inadequate. The courts have stated that in cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982).

In order to determine whether the search conducted was adequate, we contacted the Director's Office. We were informed that the request was referred to the Manager of the Ohio Field Office in Miamisburg, Ohio, and that the following Miamisburg locations were searched: (i) the Manager's Office, (ii) the Contract and Procurement Office, (iii) the Office of Chief Counsel, and (iv), the offices of the DOE Miamisburg Records contact person and Industrial Relations Specialist. The request was also referred to BWXT, which conducted a search of its records, and to BWXT's law firm. *See* memorandum of December 8, 2005 telephone conversation between Robert Palmer, OHA Staff Attorney, and Marian Wilcox, DOE Environmental Management Consolidated Business Center. Mr. Kirk has not suggested, and we have been unable to discover, any other location in

which responsive documents could reasonably be expected to be located. Based on the information before us, we conclude that the search for responsive documents was adequate.

B. The Director's Application of Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*). The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "pre-decisional" privilege. *Coastal States Gas Corporation v. Department of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980) (*Coastal States*). The deliberative process privilege is the only privilege at issue here.

The deliberative process privilege permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government formulates decisions and policies. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975); *Coastal States*, 617 F.2d at 862. The purpose of the deliberative process privilege is to promote high-quality agency decisions by fostering frank and independent discussion among individuals involved in the decision-making process. *Coastal States*, 617 F.2d at 866.

Information within the purview of the deliberative process privilege must be both predecisional and deliberative. Information is predecisional if it is prepared or gathered in order to assist an agency decisionmaker in arriving at a decision. *Renegotiation Board v. Grumman Aircraft Eng. Corp.*, 421 U.S. 168, 184 (1975). Predecisional information is also deliberative if it reflects the give-and-take of the consultative process, *Coastal States*, 617 F.2d at 866, so that disclosure would reveal the mental processes of the decision-maker, *National Wildlife Federation v. United States Forest Service*, 861 F.2d 1114, 1119 (9th Cir. 1988).

Mr. Kirk contends that the withheld portions contain factual material that cannot properly be withheld under Exemption 5. In general, Exemption 5 may not be used to withhold purely factual material. *Coastal States*, 617 F.2d at 867. However, the courts have recognized two exceptions to this general rule. Factual material may be withheld under Exemption 5 if it is so inextricably intertwined with deliberative matter that disclosure of the factual material would expose or cause harm to the agency's deliberations, *Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971), or if the author has selected specific facts out of a larger group of facts, and this very act is deliberative in nature. *Montrose Chemical Corporation v. Train*, 491 F.2d 63, 66 (D.C. Cir. 1974).

We have carefully examined the withheld portions of the responsive documents. They consist largely of the opinions and recommendations of the authors of those documents, and factual material relied upon by the authors in reaching their conclusions. The material is clearly predecisional, and

deliberative in that it reflects the “give and take” of the decision-making process. With one exception, the factual matter withheld is either so inextricably connected to the deliberative material that it is, itself, deliberative in nature, or was selected from a larger group of facts in an act that constituted an exercise of judgement by the authors. In either instance, revealing the factual material would in effect reveal the deliberative process, and very possibly compromise the quality of agency decision making.

The one exception is located on page three of Document 4, in the first sentence under the heading “II. FACTS.” This sentence describes the amount of material examined by the author in writing the memorandum, and the sources of that material. The facts in this sentence are not inextricably intertwined with deliberative material, nor are they a distillation of facts from a larger group of facts. Release of this sentence in its entirety would not expose the deliberative process of which this memorandum is a part, and it therefore cannot be withheld under the deliberative process privilege of Exemption 5.

C. The Public Interest

The fact that material requested falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that “[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest.” 10 C.F.R. § 1004.1. In this case, the public interest in release of the withheld material is attenuated by the fact that it consists largely of preliminary opinions and recommendations that may or may not be adopted by the agency. On the other hand, the release of predecisional, deliberative material concerning the very emotional subject of possible changes to retiree medical benefits could be misleading in that it could suggest that the DOE has reached a final decision on this issue, and it could also adversely effect the agency’s ability to obtain straightforward and frank recommendations and opinions in the future. This would stifle the free exchange of ideas and opinions which is essential to the sound functioning of DOE programs. *Fulbright & Jaworski*, 15 DOE ¶ 80,122 at 80,560 (1987). We do not believe that discretionary release of the withheld material would be in the public interest.

*/ We have been informed that no decision has been made regarding any possible changes in retiree benefits. *See* memorandum of December 8, 2005 telephone conversation between Mr. Palmer and Ms. Wilcox.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Eric T. Kirk, OHA Case Number TFA-0129, is hereby granted as set forth in paragraph (2) below, and is in all other respects denied.

(2) This matter is hereby remanded to the Director of the DOE's Environmental Management Consolidated Business Center. Upon remand, the Director shall either release the first sentence under the heading "II. FACTS" on page three of Document 4 to Mr. Kirk in its entirety, or withhold that information under a different exemption.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: January 3, 2006